Supreme Court, U.S.
FILED
FEB 22 2001
CLERK

(4)

No. 00-6374

IN THE
# Supreme Court of the United States

DALE G. BECKER,

*Petitioner,*

v.

BETTY MONTGOMERY, ATTORNEY GENERAL OF OHIO, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## JOINT APPENDIX

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Petition for Certiorari Filed September 25, 2000
Certiorari Granted January 8, 2001

22 pp

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## RELEVANT DOCKET ENTRIES

I. BEFORE THE U.S. DISTRICT COURT FOR THE SOUTHERN OF OHIO (COLUMBUS) CASE NO. 99-CV-825

| | | |
|---|---|---|
| 1. | 8/27/99 | Application to proceed *in forma pauperis* by plaintiff Dale G. Becker [Entry date 8/30/99] |
| 2. | 8/27/99 | Complaint [Entry date 8/30/99] |
| 3. | 8/27/99 | Order dismissing case [Entry date 8/30/99] |
| 4. | 8/27/99 | Judgment pursuant to the 8/27/99 order by Judge Edmund A. Sargus, Jr. [Entry date 8/30/99] |
| 5. | 9/20/99 | Notice of Appeal by plaintiff Dale G. Becker from District Court decision of 8/27/99 [Entry date 9/21/99] |
| 6. | 10/13/99 | Order: Plaintiff must complete the required *in forma pauperis* forms within 30 days or appeal may be dismissed [Entry date 10/13/99] |
| 7. | 10/18/99 | Motion by plaintiff Dale G. Becker to proceed *in forma pauperis* on appeal [Entry date 10/18/99] |

8. 10/26/99 Order granting motion to proceed *in forma pauperis* on appeal [Entry date 10/26/99]

II. BEFORE THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT CASE NO. 99-4190

1. 10/1/99 Prisoner case docketed; notice filed by appellant Dale G. Becker

2. 10/27/99 Copy of 10/26/99 District Court Order filed granting *in forma pauperis*

3. 10/27/99 Briefing letter sent setting *pro se* briefing schedule

4. 11/3/99 Appellee's letter filed notifying they will not be filing a brief

5. 11/8/99 Brief filed by *pro se* appellant Dale G. Becker

6. 1/13/00 Appellant's motion filed to consolidate this appeal with 99-3544

7. 1/18/00 Ruling denying appellant's motion for consolidation of this appeal with 99-3544

8. 1/31/00 Appellant's motion filed to reconsider ruling dated 1/18/00

9. 5/12/00 Order filed to dismiss case for lack of jurisdiction

10. 5/22/00 Appellant's motion filed to reconsider order dated 5/12/00

11. 7/14/00 Order filed denying motion to reconsider filed by Dale G. Becker



12. 7/25/00 Mandate issued

13. 8/31/00 Letter sent to Appellant Dale G. Becker returning unfiled petition for rehearing enbanc

14. 10/6/00 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Dale G. Becker

15. 1/12/01 U.S. Supreme Court letter filed; leave to proceed *in forma pauperis* and the petition for writ of certiorari filed by Dale G. Becker are granted

III. BEFORE THE SUPREME COURT OF THE UNITED STATES CASE NO. 00-6374

1. 9/25/00 Petition for Certiorari filed

2. 1/8/01 Petition for Certiorari granted

3. 1/16/01 Order granting Petition for Certiorari amended

[Filed: Aug. 27, 1999]

IN THE UNITED STATED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| Dale G. Becker, | : | |
| Plaintiff | : | |
| v. | : | Case No. C2-99 825 |
| Betty Montgomery, et al., | : | Judge Sargus |
| Defendants | : | Magistrate Judge Abel |

## INITIAL SCREENING ORDER

Plaintiff Dale G. Becker, an inmate at Chillicothe Correctional Institution, brings this prisoner civil rights action under 42 U.S.C. §1983. This matter is before the Court for an initial screening of the complaint pursuant to 28 U.S.C. §1915A(a) and (b)[1] and 42 U.S.C. §1997e(c) to identify

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[1] The full text of §1915A reads:

> (a) Screening.—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for Dismissal.—On review the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—
>
> (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
>
> (2) seeks monetary relief from a defendant who is immune from such relief.
>
> (c) Definition.—As used in this section, the term "prisoner" (continued...)



cognizable claims, and to dismiss the complaint, or any portion of it, which is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. This Court finds that the complaint fails to state a claim upon which relief may be granted and therefore dismisses the complaint.

The complaint generally makes the claim that plaintiff Dale G. Becker has been exposed to second-hand cigarette smoke while incarcerated at the Chillicothe Correctional Institution. The complaint fails to plead the date(s) plaintiff was exposed to second-hand cigarette smoke. It also fails to allege with particularity the actionable conduct of each named defendant.

A complaint may be dismissed as frivolous only when the plaintiff cannot make any claim with a rational or arguable basis in fact or law. *Neitzke*, 490 U.S. at 328-29; *see also Lawler v. Marshall*, 898 F.2d 1196, 1198 (6th Cir. 1990). An action has no arguable legal basis when, for example, a plaintiff claims a violation of a legal interest which clearly does not exist. *Neitzke*, 490 U.S. at 327. An action has no arguable factual basis when the allegations are delusional or rise to the level of the irrational or "wholly incredible." *Denton*, 504 U.S. at 332; *Lawler*, 898 F.2d at 1199. The complaint may not be dismissed as factually frivolous simply because the court finds the plaintiff's claims unlikely or improbable. *Denton*, 504 U.S. at 32.

When considering whether a complaint fails to state a claim under Rule 12(b)(6), Federal Rules of Civil Procedure, a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations

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[1] (...continued)

> means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or terms and conditions of parole, probation, pretrial release, or diversionary program.

in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). Rule 8(a), Federal Rules of Civil Procedure provides for notice pleading. *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A civil "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-46; *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). Moreover, pro se prisoner complaints must be liberally construed. *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980).

In order to state a claim under 42 U.S.C. §1983, plaintiff must allege that the persons engaging in the conduct complained of were acting under color of state law and that this conduct deprived plaintiff of some right secured by the Constitution or laws of the United States. *Graham v. National Collegiate Athletic Ass'n.*, 804 F.2d 953, 957 (6th Cir. 1986) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1983), *overruled in part on other grounds, Daniels v. Williams*, 474 U.S. 517 (1984)).

The complaint generally alleges that defendants have caused plaintiff Dale G. Becker to be exposed to second-hand cigarette smoke during his incarceration at the Chillicothe Correctional Institution. The complaint does not allege the date(s) on which Mr. Becker was exposed to second-hand cigarette smoke. It also fails to allege with any particularity the conduct of each individual defendant that, if proved at trial, would demonstrate that the defendant knowingly acted to intentionally expose Mr. Becker to second-hand smoke.

The complaint further fails to demonstrate that Mr. Becker has exhausted his prison administrative remedies with respect to the constitutional claims he seeks to bring against each individual defendant. Section 1997e(a) provides that "no action shall be brought with respect to prison conditions under



§1983 . . . by a prisoner confined in any . . . prison . . . until such administrative remedies as are available are exhausted." Ohio inmates have grievance procedures available under Ohio Admin. Code §5120-9-31. A complaint may not be filed in federal court until the prisoner has filed a grievance under Ohio Admin. Code §5120-9-31, the grievance has been acted on, and the prisoner has exhausted all of his administrative appellate rights with respect to the grievance. Further, prisoners must "allege and show" that they have exhausted all administrative remedies. *Brown v. Tombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). A prisoner "should attach to a §1983 complaint the administrative decision, if it is available, showing the administrative disposition of his complaint." *Id.* Plaintiff has failed to do so.

Plaintiff has attached as exhibits several grievance letters he has written to the Inspector at the Chillicothe Correctional Institution regarding whether he was on a list for a non-smoking dorm. However, all but one of these grievance letters was sent to the Inspector more than two years before Mr. Becker mailed his complaint to the Court.[2] The only grievance letter within the two-year period was sent by Mr. Becker on August 20, 1997, to Ken Eberts. It stated that he was on the list for a non-smoking dorm (E1). He wanted to know what the criteria were for getting into the non-smoking dorm. The response from Mr. Eberts, whose title was Unit Management Administrator, was that he agreed that the prison should put together a set of rules for the non-smoking dorm. There is no indication that Mr. Becker appealed from this disposition of his grievance.

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[2] The complaint was received by the Court August 23, 1999. Mr. Becker's application to proceed *in forma pauperis* was executed by him August 12, 1999. For purposes of this decision, the Court will assume that Mr. Becker placed the complaint in the mail to the Court on or about August 12, 1999.

Since Mr. Becker has failed to plead and demonstrate that he has exhausted his prison administrative remedies with respect to his complaints against each individual defendant that they have knowingly and intentionally acted to expose him to second-hand cigarette smoke, his complaint cannot be filed in district court. 42 U.S.C. §1997e(a).

Even if plaintiff had exhausted his prison administrative remedies, the complaint fails to state a claim for relief against any defendant named. To establish an Eighth Amendment claim against a prison official, plaintiff must plead and prove that he has a serious medical need for a smoke-free environment or that he was exposed to levels of environmental tobacco smoke that created an unreasonable risk of harm to his future health. He must further show that each defendant actually knew that his exposure to environmental tobacco smoke created a substantial risk of harm and that each defendant deliberately disregarded that risk by failing to take reasonable measures to abate it. *Montague v. Campell*, 1998 WL 246345 *1 (6th Cir. May 6, 1998). Here there are no such allegations with respect to any defendant named in the complaint.

For the reasons set out above, the Court HOLDS that this case must be DISMISSED because plaintiff Becker has failed to exhaust his prison administrative remedies with respect to the claims he seeks to bring against each named defendant and because the complaint fails to state a claim for relief against any named defendant. The Clerk of Court is DIRECTED to enter JUDGMENT for defendants.

It is ORDERED that the United States Marshal serve upon each defendant named in part III, B and C of the form civil rights complaint a summons, a copy of the complaint, and a copy of this Order.

The Clerk of Court is DIRECTED to mail a copy of this Order to the Attorney General of Ohio, Corrections Litigation



Section, 140 E. Town St., 9th Floor, Columbus, Ohio 43215-6001.

/s/ Edmund A. Sargus, Jr.
United States District Judge

[Filed: Aug. 27, 1999]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

JUDGMENT IN A CIVIL CASE

Dale G. Becker

vs. Case Number C2-99-825

Betty Montgomery, et al., Judge Sargus
Magistrate Judge Abel

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED This case must be DISMISSED because plaintiff Becker has failed to exhaust his prison administrative remedies with respect to the claims he seeks to bring against each named defendant



and because the complaint fails to state a claim for relief against any named defendant.

Date: August 27, 1999 Kenneth J. Murphy, Clerk

/s/ Sherry Hatfield
By Sherry Hatfield / Deputy Clerk

[Filed: Sep. 20, 1999]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

Dale G. Becker

Docket Number 02-99-825

Judge Sargus
(District Court Judge)

Betty Montgomery, et al.

NOTICE OF APPEAL

Notice is hereby given that Dale G. Becker appeals to the United States Court of Appeals for the Sixth Circuit from the (XXX) Judgment (___) Order (___) Other (specify) _____ _____ entered in this action on August 27, 1999.
(Date)

Dale G. Becker
(Counsel for Appellant)
Address: Box 5500
No. 249-474
Chillicothe, Ohio 45601-0990

Phone: _____

Date: September 13, 1999



UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
Clerk

CAROL FIELD
(513) 564-7024

Filed: October 27, 1999

Dale G. Becker
Chillicothe Correctional Institute
#249-474
P.O. Box 5500
Chillicothe, OH 45601

Betty Montgomery
Office of the Attorney General of Ohio
30 E. Broad Street
17th Floor State Office Tower
Columbus, OH 43215-3428

RE: 99-4190
Becker vs. Montgomery
District Court No. 99-00825

We have today docketed the above-styled case as number 99-4190 in this Court. This case number must appear on all documents related to this case which are submitted to the Court.

The briefing schedule for this appeal is listed below. The briefs and joint appendix will be deemed filed on the day of mailing if sent by ordinary first-class mail or third party commercial carrier.

The court is aware that you are not an attorney and it will not hold you to the same standards it requires of them in stating your case. Enclosed you will find a form to be used to present your case in your own words as clearly as you can. Your failure to file a brief or joint appendix (as applicable) by the established due dates may result in the dismissal of your case.

## BRIEFING SCHEDULE

| | |
|---|---|
| Appellant's Brief: | Signed original & 6 Copies<br>(See attached Pro Se Brief Form)<br>Maximum 30 Pages<br>Due 11/24/99 |
| Appellee's Brief: | Signed original & 6 Copies<br>Red Cover<br>Maximum Length: See Rule 32 for page or type - volume limitations<br>Due 12/22/99 |
| Appellant's Reply Brief: (Optional) | Signed original & 6 Copies<br>Maximum 15 pages<br>Due 1/5/00 |
| Joint Appendix or: Photocopies of Record | 5 Copies of Joint Appendix or<br>4 Copies of Record<br>White Cover<br>Due 1/12/00 |

In prisoner cased filed pro se and in forma pauperis, the state attorney general or the United States Attorney, as the case may be, is required to file an adequate appendix. The appendix shall include copies of the opinion and order from which the appeal is taken.

Two copies of your brief and one copy of the joint appendix (as applicable) are to be served on opposing counsel,



pursuant to Fed. R. App. P. 25(d). A certificate of service must accompany the submission of any document to this court.

If you have any questions about these instructions, you should contact the case manager at the number listed above.

(Ms.) Carol Field
Case Manager

[Filed: May 12, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| DALE G. BECKER, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| Betty Montgomery, et al., | ) | |
| Defendants-Appellees. | ) | |

Before: BATCHELDER, MOORE, and BEEZER*, Circuit Judges.

This matter is before the court upon initial consideration of appellate jurisdiction.

A review of the documents before the court indicates that the judgment of the district court was entered August 30, 1999. A notice of appeal was filed from that decision but it was not signed.

This court lacks jurisdiction over this appeal. The notice of appeal is defective because it was not signed by the pro se

* The Honorable Robert R. Beezer, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.



appellant or by a qualified attorney. *See Mattingly v. Farmers State Bank*, 153 F.3d 336, 337-38 (6th Cir. 1998) (per curiam).

It is ordered that the appeal is dismissed.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green/[illegible]
Clerk

* The Honorable Robert R. Beezer, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

[Filed: July 14, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| DALE G. BECKER, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | ORDER |
| | ) | |
| Betty Montgomery, et al., | ) | |
| Defendants-Appellees. | ) | |
| | ) | |

Before: BATCHELDER, MOORE, and BEEZER*, Circuit Judges.

Plaintiff-appellant has filed a motion for reconsideration of this court's order of May 12, 2000 dismissing the appeal on the basis that the notice of appeal was not signed.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

The motion for reconsideration is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green/[illegible]
Clerk



**IN THE SUPREME COURT
OF THE UNITED STATES**

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[Caption Omitted in Printing]

Order Granting Petition for a Writ of Certiorari entered on January 8, 2001.

[Entered: Jan. 16, 2001]

**IN THE SUPREME COURT OF THE UNITED STATES**

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[Caption Omitted in Printing]

The Order Granting the Petition for a Writ of Certiorari is amended to read as follows: The motion of petitioner for leave to proceed *in forma pauperis* is granted. The Petition for a Writ of Certiorari is granted limited to the following question: When a party files a timely notice of appeal in district court, does the failure to sign the notice of appeal require the court of appeals to dismiss the appeal?